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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CRUZ SUPERIOR COURT

SANTA CRUZ COUNTY GREENWAY, Petitioner, v. SANTA CRUZ COUNTY REGIONAL TRANSPORTATION COMMISSION, Respondent. PROGRESSIVE RAIL INCORPORATED, et al., Real Parties in Interest	Case No. 18CV02101 **REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** (Cal. Code Civ. Proc. §§ 1085, 1094.5; California Environmental Quality Act) Assigned for All Purposes to: Hon. Paul Burdick (Dept. 5) Action Filed: July 19, 2018 Hearing Date: December 14, 2018 Time: 9:00 a.m.

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INTRODUCTION

The opposition brief of the Santa Cruz County Regional Transportation Commission ("RTC") is an exercise in evasion and distraction. While the RTC tries to minimize its role in entering into the Administration, Coordination and Licensing Agreement ("ACL Agreement" or "Project") and to distract this Court from the relevant legal issues, the agency cannot avoid its duties under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq. The record here does not support the RTC's decision to approve a Class 1 and Class 2 exemption for this Project, which would greatly expand freight service on the Santa Cruz Branch Line while harming nearby biological resources and endangering public health.

The RTC repeatedly attempts to distance itself from any involvement in Progressive Rail's plans to expand freight activities from a shuttered operation to 3,000 annual carloads. This gambit fails. Once the RTC issued a notice of default to its prior operator, Iowa Pacific, in December 2017, it was in the driver's seat. It could have requested that Iowa Pacific abandon the Line. It could have selected a different operator. It could have used its negotiating power to ensure that the impacts of increased freight operations were resolved. The RTC's claim now that it lacked "discretionary authority" when it approved the ACL Agreement contravenes the entire administrative record for this Project.

Perhaps recognizing the weakness of its position, the RTC also tries to distract this Court with several irrelevant legal arguments. For instance, the RTC now invokes two new exemptions (for ministerial projects and emergency repairs) that the Notice of Exemption does not list and that are inapplicable on their face. In addition, the RTC suggests that Greenway's lawsuit is somehow both too early, as the Unified Corridor Investment Study has not been completed, and too late, as the RTC already took some preliminary, non-binding steps toward track repair. But because the RTC's approval of the ACL Agreement is what authorizes the expanded freight service and what obligates the RTC to repair the track, the petition was perfectly on time.

Finally, the RTC and Progressive Rail both flail in their attempts to assert federal preemption. To begin with, they misrepresent *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, which is binding on this Court. They mistakenly assert that the decision turns on a public agency's common carrier status rather than on its ownership of the rail line. They also contend that this Court may not grant relief that would indirectly burden Progressive Rail's freight operations; *Friends of the Eel River* holds just the opposite. At the same time, the RTC and Progressive Rail cite wholly inapposite federal authority construing the Interstate Commerce Commission Termination Act ("ICCTA"). Finally, in a desperate move, Progressive Rail asserts that because Greenway "improperly" named Progressive Rail as a real party in interest, the entire case must be dismissed. Nothing in state law supports this fanciful defense.

In short, the two opposition briefs provide no support for the RTC's decision to forge ahead with its approval of the ACL Agreement without first complying with CEQA. Accordingly, this Court must issue a writ directing the RTC to rescind its action.

ARGUMENT

I. The RTC's New Claim that It Took No Discretionary Action Is Unfounded.

The RTC opens its brief with a new argument: that the approval of the ACL Agreement was not a discretionary act subject to CEQA. Respondent's Opposition to Petitioner's Opening Brief ("RTC"):15-17. Specifically, the RTC claims that because it is "precluded from operating or regulating freight service" (*id.* at 15), it allegedly "lacks the authority to address *any* of the environmental concerns that might be raised" in an environmental impact report ("EIR") (*id.* at 16 (emphasis added)). The argument is entirely mistaken.

The RTC's prior position—that some form of CEQA compliance was required—was correct. As the RTC's cited case holds, a project is ministerial only if a private party can "legally compel approval without any changes in the design of its project." *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 302 (citation omitted). Progressive Rail had no such ability here. Rather, the RTC had significant discretion to

pursue other options with fewer environmental impacts. First, it could have sought abandonment of the Line. Indeed, the RTC's agreement with its prior operator contemplated this outcome: in the event of Iowa Pacific's default, it provided that "Railway *shall* proceed to abandon Freight Service" with the Surface Transportation Board ("STB"). Administrative Record ("AR") 6:3212 (emphasis added).

Second, the RTC could have pursued an agreement with a different operator. The RTC's request for proposals demonstrates it had the discretion to select any of the responding entities. AR 6:3163. The RTC could have chosen an operator that would focus on activities with fewer environmental impacts. *E.g.*, AR 2:504-5 (detailing proposals from California Coast Railroad, Railmark, and Big Trees).

Third, the RTC could have used its authority to negotiate with Progressive Rail to reduce potential environmental impacts. While the STB has exclusive jurisdiction over "transportation by rail carriers" (49 U.S.C. § 10501(b)), it does not regulate the RTC's proprietary decisions about upgrades to the Line, methods of repair and construction, the level of service to be provided on the Line, or the construction and expansion of ancillary facilities. *Joint Petition for Declaratory Order—Boston & Maine Corp. and Town of Ayer* (Apr. 30, 2001, STB Finance Docket No. 33971) 2001 STB LEXIS 435, *14; *Friends of the Eel River*, 3 Cal.5th at 724-25; AR 2:890 (RTC acknowledging its control).

In sum, because the RTC exercised discretion in selecting the rail operator and in negotiating the terms of the ACL Agreement, its approval of the contract triggered CEQA.

II. The RTC Fails to Demonstrate that the Project Is Categorically Exempt.

The RTC asserts that it is entitled to significant discretion in determining whether the Class 1 and Class 2 exemptions apply to this Project. RTC:14. But these exemptions are to be interpreted narrowly; agencies may not stretch the regulatory language defining the exemptions beyond its plain meaning. *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 697. The Project here does not remotely qualify for a Class 1 or Class 2 exemption.

A. The Project Involves a Significant Expansion of Use.

As Greenway has explained, the Class 1 exemption is unavailable because the ACL Agreement will result in a significant expansion of freight service on the Line. Opening Brief in Support of Petition for Writ of Mandate ("POB"):15-21. In response, the RTC concedes that if this Project involves a "significant expansion of use," the Class 1 exemption does not apply, and the approval must be overturned. RTC:18. To avoid this fate, the RTC dismisses its approval of the ACL Agreement as a "mundane" act intended to "maintain the status quo." RTC:9, 18. It then attempts to inflate the Line's existing use while downplaying Progressive Rail's proposed expansion. The record does not support this effort.

1. The RTC Misrepresents the Use of the Line at the Time of Its CEQA Determination.

The CEQA Guidelines explain that in determining whether the Class 1 exemption applies, the agency must consider the use "existing at the time of the lead agency's determination." Guidelines § 15301. Here, the RTC employs two tactics to obfuscate the fact that, as of June 2018, the Line was not being used for freight at all. AR 1:13, 105-06, 308.

First, the RTC claims that freight service was "already operating" and had "never stopped completely." RTC:18, 23. Not so. According to RTC staff and agency records, *all* freight service had stopped prior to its June 14, 2018 decision. *E.g.*, AR 1:13, 2:674. Because the RTC offers no explanation for how it has reached a contrary conclusion in litigation, this Court may not rely on its unsupported statements. Guidelines § 15384(a) (substantial evidence does not include speculation or unsubstantiated opinion).

Second, the RTC claims that it may rely on larger, historic averages to determine "existing use." RTC:21-23. For support, it asserts that the "existing use" term in the Class 1 exemption is "interchangeabl[e] with the concept of environmental baseline." RTC:21. But neither the regulations nor the RTC's cited case law supports this view.

For the Class 1 exemption, the Guidelines expressly state that "existing use" is measured "at the time of the lead agency's determination." Guidelines § 15301; *see also* Declaration of S. Clark in Support of Petition for Writ of Mandate, Ex. 1, at p. 2 (regulatory

history). For the environmental baseline concept, which is used to analyze potential impacts in an EIR, the Guidelines provide that the physical conditions at the time of the notice of preparation "*normally constitute*" the baseline. Guidelines § 15125(a) (emphasis added). As the Supreme Court explained in its seminal case *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, it is the Guidelines' use of the term "normally" that allows an environmental baseline to deviate from the physical conditions at the time of the notice. (2013) 57 Cal.4th 439, 451-53 ("to state the norm is to recognize the possibility of departure from the norm") (citation omitted). Critically, the Class 1 exception does *not* contain the word "normally"—a fact that RTC ignores. Accordingly, the Class 1 exemption lacks the flexibility that the RTC desires.

The RTC asserts that *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832, 872 and *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1311-12 support its "environmental baseline" argument. RTC:21. The RTC is wrong. *North Coast Rivers Alliance* discusses environmental baselines in determining whether to apply the "unusual circumstances" exception to the Class 1 exemption, not the Class 1 exemption itself. 227 Cal.App.4th at 872-73. *Bloom* does not mention the baseline concept at all. 26 Cal.App.4th at 1311-16. The remainder of the RTC's cited cases are also irrelevant, as they do not link the Class 1 exemption and the concept of environmental baseline. RTC:22.

In sum, there was no existing freight use at the time of the RTC's determination. Nothing in CEQA permits the agency to inflate that use to qualify for a Class 1 exemption.

2. The RTC Cannot Ignore Progressive Rail's Planned Expansion.

In attempting to shrink the difference between the existing use and future use of the Line, the RTC tries a second tactic: to minimize the extent of Progressive Rail's planned expansion of freight service. This attempt is unavailing.

First, the RTC asserts that Progressive Rail's proposal was only a "sales pitch." RTC:21. It suggests that because the promised expansion of freight service may never materialize, it need not examine the Project's impacts. *Id.* But this argument contravenes settled CEQA law holding that agencies must examine the full scope of a proposed project.

Guidelines § 15378(a) ("Project" defined as "the whole of an action"). As one court explained, "[t]he entirety of the project must be described, and not some smaller portion of it." *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654. Here, the RTC dismisses Progressive Rail's planned expansion as a mere "aspirational goal[]," and asks the Court to focus instead on the *minimum* levels of freight required by the ACL Agreement. RTC:21. CEQA does not permit this approach.

San Joaquin Raptor is instructive. There, the lead agency described the proposed project as allowing 260,000 tons of aggregate mining per year—an amount in line with prior operations. 149 Cal.App.4th at 650. The relevant permit, however, allowed production of up to 550,000 tons per year. *Id.* Despite assurances from the lead agency and the applicant that there would be no increase in production, the court held that CEQA required analysis of the larger amount authorized under the permit. *Id.* at 654-57.[1] Here, the facts are more compelling: Progressive Rail has provided *specific assurances* to the RTC that it intends to expand freight use to at least 3,000 carloads per year, and the ACL Agreement both facilitates that expansion and places no limits on growth. AR 1:173-74; 2:577.

Indeed, the RTC's assertion that the expanded freight use may never materialize is irrelevant under CEQA. Development entitlements rarely *require* the developer to do anything. Nevertheless, CEQA mandates that the lead agency analyze the level of development that the agency has allowed. As the court explained in *Christward Ministry v. Superior Court*, "[t]he fact future development is not certain to occur … does not lead to the conclusion no EIR is required." (1986) 184 Cal.App.3d 180, 194-95; *see Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 279.

The RTC's reliance on *Rodeo Citizens Assn v. County of Contra Costa* (2018) 22 Cal.App.5th 215 is misplaced. *See* RTC:21. In that case, the court emphasized that the expanded operations referenced by company executives would be limited by an existing air

[1] While *San Joaquin Raptor* concerns the adequacy of an EIR, its analysis of the "project" is based on Guidelines section 15378(a), which also applies to categorical exemptions.

district permit, and thus were speculative. *Id.* at 221. Further, any changes in future operations, the court found, were unrelated to the project before the agency. *Id.* at 223. The facts here are distinguishable. The ACL Agreement places no limit on Progressive Rail's future use of the Line, as the RTC admits. RTC:16. And the agency here directly facilitated the expansion by selecting Progressive. AR 6:3084 (prior operator suffered declining use).

Second, the RTC attempts to deny the planned expansion of freight service by claiming that it considered only whether the new operator would "meet the needs of existing customers." RTC:19. The RTC misrepresents its own actions. In fact, the cited list of "objective evaluation criteria" is nowhere limited to the operator's ability to serve existing customers. AR 6:3175, 3166 (explaining contents of service plan). Indeed, in dismissing the next most qualified operator, the RTC specifically noted its "low likelihood to *grow* the freight business." AR 2:505 (emphasis added); *see also* AR 1:11 (staff report states that Progressive Rail has "greatest strength" to "*develop*" freight (emphasis added)).

Third, the RTC claims that it has no ability to regulate or otherwise interfere with Progressive Rail's choices, insinuating that it is not responsible for the Project's expansion of freight service. RTC:19. Again, this assertion is incorrect. This Court's focus is on the RTC's decision at the time of the Project's approval.[2] *See Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1594-1595. At that time, it could have required Iowa Pacific to pursue abandonment of the Line[3] or decided to move forward

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[2] For this reason, the RTC's hypotheses about Progressive Rail's continued freight operations after termination of the ACL Agreement are irrelevant. RTC:19. But they are also inaccurate. The Agreement requires that upon termination, Progressive Rail must pursue either abandonment of the Line or a transfer of its interests. AR 6:2979 (§ 8.2.2); *see also* AR 7:3438 (freight easement is conditioned on ACL Agreement).

[3] The RTC's assertion that it was required to enter into a replacement contract to "avoid potential liability for state funds" is misplaced. RTC:18-19. It is not clear that the RTC would be required to pay back state funding for the purchase of the Line. AR 3:1295-96 (rail expert explaining other options). Even if payback were required, the RTC still made a *discretionary* decision to move forward with a new operator, rather than engaging in repayment. It was not *required* to do anything.

with another operator. The RTC's decision to move forward with a new operator promising 3,000 annual carloads within 5 years rests squarely on its shoulders.

Fourth, in a surprising turn, the RTC asserts that the Line itself may not be viable for expanded freight service at all. RTC:21. But this statement contradicts the entire record before the agency, which touted Progressive Rail's ability to find new freight customers. POB:16-17 (citing evidence). Indeed, the only "evidence" cited by the RTC is a 10-year-old study that offers no insight into current market conditions. RTC:21 (citing AR 7:3704-11).

Finally, the RTC's argument about track upgrades is a distraction. RTC:20. Greenway noted that the ACL Agreement requires the RTC to repair the Line north of existing freight customers, which are located before Milepost 3.5, indicating a mutual intent to expand freight service. POB:17; AR 6:2971 (§ 5.1), 3088-90 (RTC plans include permanent repairs along entire Line). That the ACL Agreement *also* includes language requiring further upgrades to Class 1 standards in the event that passenger rail is authorized (AR 6:2971 (§ 5.1)) is irrelevant to the Court's analysis.

B. The RTC Cannot Deny that Its Repairs Facilitate a Change in Purpose for the Line.

As Greenway has explained, the RTC also failed to meet its burden of demonstrating that the Project's repairs qualify for the Class 2 exemption, which exempts repair activities that do not facilitate a change in purpose. POB:21-22; *see* Guidelines § 15302. Instead of pointing to substantial evidence to support its position, the RTC fabricates new excuses, none of which survive scrutiny.

Under CEQA, the RTC must demonstrate, with citation to the record, that the proposed repairs will be of the same scope and location as the existing Line and will not facilitate a change in its overall purpose. General statements about the need for repairs, like those contained in the record (AR 6:3173-74), will not do. *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 698. The RTC offers no plausible explanation for why *Save Our Carmel River*, which requires lead agencies to provide adequate information about their repair or replacement projects, is inapplicable.

Nor does it begin to rebut the evidence here: that the principal purpose of the repairs is to facilitate a broad expansion of freight service along the Line. *See* Section II.A.2, *supra.*

Instead, the RTC first claims that *all* repairs past Milepost 7 qualify for CEQA's statutory exemption for *passenger* rail. RTC:23, fn. 12 (citing Pub. Resources Code § 21080(b)(10)[4]). This is a red herring. If the RTC elects to pursue passenger rail at some point in the future—a strategy that is at best uncertain—then the ACL Agreement provides that the RTC must bring this part of the Line up to certain track standards. AR 6:2971 (§ 5.1). That future decision may qualify for the statutory exemption, but it is irrelevant to the question before this Court. The challenged approval allows Progressive Rail to operate freight on the entire Line *now*. AR 6:2963 (§ 2.1). The repairs necessary to facilitate that freight traffic are not part of any passenger rail project and do not qualify for the exemption.

The RTC also raises a new claim that Greenway is "too late" to challenge the repair work. RTC:24. This ploy fails, too. The prior actions cited by the RTC—its initial application for federal disaster assistance (AR 6:3309-11) and its selection of a contractor for planning work (AR 6:3091)—were *preliminary* steps in preparing to fix the Line. They are not the type of irreversible commitments that trigger CEQA, and the RTC made no effort to comply with the statute. *See City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846, 854-61 (application for grant funding to expand existing facility was not a "project" under CEQA). By contrast, approval of the ACL Agreement created a new, irreversible commitment by the RTC to bring the Line into good repair (AR 6:2971 (§ 5.1)), triggering CEQA.

C. The RTC Cannot Rebut Record Evidence that the Project Presents Unusual Circumstances.

The Supreme Court recently explained that, under the "unusual circumstances" exception, a project is not categorically exempt from CEQA if either of the following criteria is met: (1) the project *will* have a significant impact, or (2) the project presents a reasonable possibility of significant impact due to unusual circumstances. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105; Guidelines § 15300.2(c).

[4] Except as otherwise noted, all future statutory references are to the Public Resources Code.

Greenway has shown that both criteria are satisfied here. POB:22-27. The RTC presents no convincing response.

1. The RTC Previously Acknowledged that Train Noise Impacts Are Significant.

Using the RTC's own studies, Greenway demonstrated that the Project will result in a significant noise impact due to increased horn use and freight traffic near sensitive receptors. POB:22-24. In response, the RTC offers two feeble excuses. First, the RTC claims that, because the Project will result in "no change" from prior operations, any train horns should be considered part of the baseline. RTC:28-29. The evidence, however, shows that the Project will result in an expansion of freight traffic. *See* POB:15-18; Section II.A.2, *supra.*

Second, the RTC asserts that its prior study—which demonstrated that train horn noise is a significant environmental impact (AR 4:1862, 1887)—does not apply here. Specifically, the RTC claims that because the prior study concerned *passenger* trains, it says nothing about freight traffic. RTC:29. But the disturbance caused by a train horn is the same, regardless of whether the cars behind the locomotive are carrying lumber or commuters. AR 4:1857 (all trains must comply with Train Horn Rule, requiring horn blasting at all crossings). For this reason, *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 892-95—where the court dismissed attempts by petitioner's non-expert to manipulate the agency's complicated noise modeling—is inapposite. The RTC's effort to dismiss the study based on carload volume (RTC:29) is equally unfounded, as Progressive's plans for freight are in line with the passenger rail volumes modeled in the study. AR 2:577; 4:1882.

In short, because the RTC's own studies demonstrate that the Project will have a significant noise impact, the first criterion of the unusual circumstances exception applies.

2. The RTC Does Not Deny that the Project's Repair Work Will Occur in Environmentally Sensitive Locations.

Greenway has demonstrated that the Project also satisfies the second criterion of Guidelines section 15300.2(c)'s exception to the categorical exemption: unusual circumstances about the Project create the reasonable possibility of significant impacts to biological resources. POB:24-27. Tellingly, the RTC concedes that the Project's repair work

will be located in or near sensitive wetlands, coastal bluffs, and other habitats for threatened and endangered species. *See* RTC:26; POB:26. To salvage the exemption, the RTC resorts to extraneous arguments that find no support in the law or the record.

The RTC's first response is to pursue an irrelevant tangent about licensing agreements between railroad owners and operators being "commonplace." RTC:26. But the RTC poses the wrong question; under the exemption, the agency must ask whether the Project presents unusual circumstances when compared to "existing facilities of *all types*." *World Business Academy v. State Lands Com.* (2018) 24 Cal.App.5th 476, 496 (emphasis added). Based on this broader comparison, the location of the Line is clearly an unusual circumstance. The vast majority of existing facilities operate in places without the presence of endangered or threatened species, a fact readily ascertained through "experience with the mainsprings of human conduct." *Berkeley Hillside*, 60 Cal.4th at 1114 (citation omitted). Especially given that CEQA calls for protection of these species (Guidelines, Appx. G, § IV (a), (b); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722-29), this Court should find that the Project presents circumstances that are unusual compared to those around other existing facilities.

The RTC cannot distinguish cases, such as *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165 and *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, that recognize sensitive environmental conditions as unusual circumstances. Contrary to the RTC's assertion (RTC:27), *Azusa* does *not* turn solely on a statutory requirement for landfills; it also relies on the landfill's location atop "a major drinking water aquifer in highly permeable sands and gravel." 52 Cal.App.4th at 1208. And the fact that one court has distinguished *McQueen* on other grounds says nothing about the applicability of its unusual circumstances analysis to the present case. *See Citizens for Environmental Responsibility v. State* (2015) 242 Cal.App.4th 555, 584 (project involved normal operations of existing facility, unlike projects in *McQueen* and this case).

Finally, the RTC advances an entirely new argument: that the Project's repair work is statutorily exempt as emergency repairs. RTC:26. This tack fails. The cited exemption is

available only for specifically defined emergencies, which "involve a clear and imminent danger, demanding immediate action." § 21060.3.[5] Emergency exemptions are "obviously extremely narrow;" they may be used only when the lead agency "simply *cannot*" complete CEQA review prior to beginning repairs. *Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal.App.3d 1104, 1111 (citation omitted), *overruled on other grounds.* Here, the track damage was sustained nearly two years ago and has yet to be repaired. The RTC offers no explanation why CEQA review could not have been completed during that time.

3. The RTC Cannot Refute the Substantial Evidence Supporting a Fair Argument that the Project May Cause Significant Environmental Impacts.

Greenway likewise has demonstrated that the Line's proximity to sensitive biological resources created a reasonable possibility of significant environmental harm. POB:26-27 (discussing second criterion of Guidelines § 15300.2(c)). The RTC provides three defenses, none of which have merit.

First, the RTC claims that Greenway merely cited "general information regarding the proximal location of potentially sensitive resources." RTC:27. The RTC is wrong. Greenway pointed to specific evidence in the record indicating that the repair work will likely impact sensitive species. *E.g.*, AR 3:1277-79; 4:2137-95, 2244-47, 2258-60 (repair work required in Harkins Slough, habitat for Santa Cruz tarplant, California red-legged frog, and southwestern pond turtle). Nevertheless, even generalized information is sufficient for the fair argument test. For example, in *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 734, the court found a fair argument of significant biological impacts based on information that mountain lions lived near the project site and a general study that noise, such as that created by the project, could adversely affect wild animals. Greenway's information easily meets this standard.

[5] The cited exemption is also limited to repairs to "maintain service." § 21080(b)(2). But the damaged segment has been designated "out of service" for nearly two years. AR 6:3172.

Second, the RTC claimed that the Federal Emergency Management Agency ("FEMA") already determined that the repair work would not have significant impacts on biological resources. RTC:27. The record is flatly to the contrary. FEMA funding has only been granted for work to remove fallen trees and other debris. AR 5:2334-35. The *permanent* repairs at issue in this case have not yet been funded (AR 2:659-61); accordingly, FEMA has made no environmental determination relevant to this case (AR 6:3089).

Finally, the RTC makes an offhand assertion that the application of other laws will automatically reduce all potentially significant impacts to less than significant. RTC:27-28. Contrary to the RTC's statement (RTC:28), Greenway never argued that Progressive Rail would flout applicable law. Moreover, while application of these requirements may reduce impacts, they will not automatically reduce them below the thresholds of significance. *E.g.* AR 4:2180. For this reason, agencies cannot escape the application of CEQA based on their compliance with other laws. *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-13*, overruled on other grounds*.

In sum, even if this Court were to conclude that the Class 1 or 2 exemption applies, either criterion of the unusual circumstance exemption necessitates CEQA compliance.

III. *Friends of the Eel River* Forecloses Any Preemption Defense.

The Supreme Court's recent *Friends of the Eel River* decision controls the preemption analysis in this case. But rather than address this decision squarely, Progressive Rail and the RTC seek to distract by recycling arguments directly rejected by the Supreme Court. At the end of the day, Progressive Rail and the RTC's handwaving does not change the fact that the Supreme Court's decision, made on remarkably similar facts to those in this case, directly forecloses their preemption defense.

A. Because the RTC Is Acting as Owner Rather than Regulator, the ICCTA Does Not Preempt Its Review of the Project Under CEQA.

The Supreme Court's decision in *Friends of the Eel River* confirms that when a state agency like the RTC owns the railroad line, the ICCTA does not displace the agency's duty under state law to undertake CEQA review. This is so even though a private railroad

operator subject to STB's jurisdiction is involved in the project. The RTC's uncontested ownership of the Line is thus the beginning and end of the preemption analysis in this case.

1. The RTC's Status as Owner of the Line Controls the Preemption Analysis.

As Greenway explained, *Friends of the Eel River* establishes a straightforward test to determine when the ICCTA preempts the application of CEQA. POB:29-30. Because Congress intended the ICCTA to "preempt[] solely 'regulation' of rail transportation," the dispositive question is whether the state, in applying CEQA, acts in its regulatory capacity. *Friends of the Eel River*, 3 Cal.5th at 723 (quoting 49 U.S.C. § 10501(b)).

Friends of the Eel River already answered that question here. When a public agency owns a railroad line, the state can require the agency to comply with CEQA before undertaking a freight project on that line because the state is acting in its capacity as owner, not regulator. *Id.* at 690, 723. In such a case, the "application of CEQA … constitutes self-governance on the part of a sovereign state and at the same time on the part of an owner." *Id.* at 723. Just as a private owner of the line could apply internal guidelines in deciding whether and how to go forward with a project, a state owner can apply CEQA, which is simply "an internal guideline governing the processes by which state agencies may develop or approve projects that may affect the environment." *Id.* at 724.

Neither the RTC nor Progressive Rail contests that the RTC owns the Line. Nor do they contest that the RTC undertook the Project in its capacity as owner, by soliciting proposals for a new operator, selecting Progressive Rail based on its proposal, and designing the terms of the ACL Agreement that govern track repair and freight services. AR 6:3162-63, 3170-71, 3175. Indeed, the RTC's Notice of Exemption identifies it as the project applicant and the entity carrying out the Project. AR 1:1. Despite these undisputed facts, the RTC and Progressive Rail raise a series of misguided preemption arguments, none of which alters the straightforward analysis that *Friends of the Eel River* requires.

First, the RTC and Progressive Rail ask this Court to follow inapposite federal case law on ICCTA preemption rather than the California Supreme Court authority that controls

here. *See* Progressive Rail's Opposition to Petitioner's Opening Brief ("PR"):8; RTC:16. Tellingly, the Court in *Friends of the Eel River* itself distinguished these cases as instances of ordinary state or local *regulation* of private railroad carriers rather than self-governance on the part of the state. 3 Cal.5th at 717-20 (discussing cases); *see, e.g.*, *City of Auburn v. United States* (9th Cir. 1998) 154 F.3d 1025 (ICCTA preempted county's application of environmental permitting laws to privately owned line); *Green Mountain Railroad v. Vermont* (2d Cir. 2005) 404 F.3d 638, 639-40 (Vermont's preconstruction permitting requirements were preempted as applied to a private owner's "propos[al] to build transloading facilities *on its property*.") (emphasis added); *cf. Oregon Coast Scenic Railroad, LLC. v. Oregon Dept. of State Lands* (9th Cir. 2016) 841 F.3d 1069 (ICCTA preempted Oregon's attempt to require compliance with state permitting requirements). Moreover, the Supreme Court's decision binds this Court even if it were in direct conflict with federal appellate authority. *See Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Seaton* (2001) 26 Cal.4th 598, 653.

Second, Progressive Rail and the RTC erroneously assert that *Friends of the Eel River* turned on the state agency's status as a rail carrier, a fact not present here. PR:9; RTC:17. In fact, *Friends of the Eel River* turned exclusively on the fact that the state agency that initiated the railroad project was "the owner of [the] rail line" such that application of CEQA constituted an act of self-governance rather than regulation. 3 Cal.5th at 724. Here, RTC is likewise the owner of the Line.

Nor did Greenway "incorrectly assum[e]" that "the RTC is a rail carrier," as Progressive Rail contends. PR:9. Rather, Greenway noted that RTC is *not* a rail carrier, and thus STB has no jurisdiction over the RTC. POB:31. Far from hurting Greenway's arguments, these facts bolster the conclusion that the RTC's proprietary decisions about the Project belong to a "deregulated sphere" outside the STB's regulatory authority. *Cf. Friends of the Eel River*, 3 Cal.5th at 725. Indeed, the STB had no relevant regulatory authority at the time of RTC's approval, since the STB neither regulates the RTC nor regulated Progressive Rail prior to its assumption of common carrier status. *Compare* AR 2:0847, 0861

(ACL Agreement approved on June 14, 2018) *with* Real Parties in Interest's RJN, Ex. 1 (common carrier status granted August 2018).

Finally, the RTC and Progressive Rail incorrectly contend that Greenway's CEQA claims are moot because, even if the RTC should have complied with CEQA before finalizing the ACL Agreement, it cannot do so now without invading the STB's jurisdiction. RTC:17; PR:9-10. This is nonsense. Real parties in interest like Progressive Rail may not "effectively defeat a CEQA suit" by moving ahead with a project based on a defective approval. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203; *see also Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 882, 890 (case not mooted by completion of project where real party in interest "made a calculated business decision" to go forward with project despite pending CEQA challenge). Indeed, the *Friends of the Eel River* decision rejected this very same argument, holding that the public railroad owner is obligated to comply with CEQA even if doing so may interfere with private freight operations. 3 Cal.5th at 740; *see* Section V, *infra.*

2. Because the RTC Undertook the Track Repair Element of the Project in Its Capacity as Owner, Track Repair Is Not Preempted.

Progressive Rail argues that track repair qualifies as "transportation by rail carrier" (49 U.S.C. § 10501(a)(1)), so that it falls under STB jurisdiction and CEQA review is preempted. PR:11-13. *Friends of the Eel River* again forecloses this argument. As Progressive Rail concedes (PR:13), the Court in *Friends of the Eel River* expressly held that track repair, which was a key component of the project there, lies "within the owner's sphere under the ICCTA" rather than the STB's "because the STB has chosen not to regulate track repair and renovation on existing lines." 3 Cal.5th at 724-25 (citing authority); *see also id.* at 691. Progressive Rail characterizes this holding as mere "dicta" (PR:13), but it applied directly to the "facts and the issue then before the court" and is thus binding. *McDowell & Craig v. Santa Fe Springs* (1960) 54 Cal.2d 33, 38. Notably, the federal court cases on which Progressive Rail again relies are not binding. *See* PR:12-13.

Moreover, even if the STB did for some reason directly regulate track repair in this case, that would not alter the preemption analysis that *Friends of the Eel River* requires. The RTC in its capacity as owner of the Line decided to undertake track repairs to reinitiate and expand rail service. AR 2:512. Application of CEQA to this proprietary decision by the state's subdivision constitutes permissible self-governance rather than preempted regulation. 3 Cal.5th at 724; *see id.* at 730 (Congress did not intend ICCTA to deprive state of its powers of self-governance).

B. The ICCTA Does Not Prevent Progressive Rail's Joinder as a Real Party in Interest, Though Its Dismissal Would Not Deprive the Court of Subject Matter Jurisdiction Over This CEQA Suit.

Progressive Rail raises the puzzling assertion that it—and this entire action—must be dismissed because it is not properly a "real party in interest" in this case. PR:10-11. This argument confuses the definition of a "real party in interest" with the rules for compulsory joinder in a CEQA suit and should be rejected.

As Progressive notes (PR:10), the California Supreme Court has broadly defined the term "real party in interest" in a writ proceeding as "any person or entity whose interest will be directly affected by the proceeding," including "the person or entity in whose favor the acts complained of [operate]" or "anyone having a direct interest in the result." *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1178 (citation omitted). Public Resources Code section 21167.6.5 does not narrow this definition, as Progressive implies (PR:10-11), but rather supplants Code of Civil Procedure ("CCP") section 389(a) for purposes of determining whether the entity is a necessary party subject to compulsory joinder. *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 855. Pursuant to section 21167.6.5, the only entities that *must* be named as real parties are those identified by the public agency in its Notice of Exemption. § 21167.6.5(a). But an entity not identified in the Notice may be properly joined under California's broad permissive joinder statute if, *inter alia*, it has an interest adverse to the petitioner's in the action. CCP § 379(a)(2).

Progressive Rail irrefutably meets the definition of a real party in interest. It has a "direct interest in the result of the proceeding" because it is a party to the ACL Agreement

the approval of which this action seeks to vacate. AR 6:2961. And, as discussed in Section V, *infra*, injunctive relief, even if entered only against the RTC, may permissibly impact Progressive's ability to operate freight service on the Line. Likewise, Progressive is subject to permissive joinder because its interest in the validity of the ACL Agreement is directly adverse to Greenway's interest in voiding the Agreement pending compliance with CEQA. Indeed, Progressive's aggressive participation in this suit evidences its interest in the outcome and its adversity to Greenway's positions.

While Progressive Rail was properly named as a real party in interest, its presence in the case is not mandatory. Pursuant to Section 21167.6.5, courts may dismiss a CEQA suit only for failing to name as real parties those entities identified in the lead agency's Notice of Exemption. § 21167.6.5(d); *see County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 32. Because the RTC's Notice of Exemption nowhere identifies Progressive Rail (AR 1:1), it is not a necessary party to this action, and the Court could proceed to enter final judgment against the RTC even in Progressive Rail's absence.

The inapposite authority on which Progressive Rail relies does not suggest otherwise. *Totten v. Hill* (2007) 154 Cal.App.4th 40 (PR:11), had nothing to do with party status, and it involved neither CEQA nor the ICCTA: rather, it affirmed that the federal ERISA statute completely preempts state law reimbursement claims by an ERISA plan. *Totten*, 154 Cal.App.4th at 50-54. By contrast, it is settled law that the ICCTA does not completely preempt CEQA claims and thus does not displace this Court's jurisdiction to adjudicate them. *Friends of the Eel River*, 3 Cal.5th at 700, 740; *see also Californians for Alternatives to Toxics v. N. Coast Railroad Authority* (N.D. Cal., May 8, 2012, Nos. C-11-04102 JCS, C-11-04103 JCS) 2012 U.S. Dist. LEXIS 64569, *30-31.

IV. The RTC Must Undertake Comprehensive CEQA Review Before the ICCTA's Preemptive Effect on Mitigation Measures Can Be Determined.

Progressive Rail and the RTC argue that the ICCTA preempts any mitigation measures the RTC might impose upon undertaking CEQA review. PR:9-10; RTC:16-17. These arguments are both premature and wrong. They also ignore the "fundamental goal"

of CEQA, which is "to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment." *Neighbors for Smart Rail*, 57 Cal.4th at 447. Even if all conceivable mitigation measures were preempted, that would not relieve the RTC of its duty to prepare an EIR that analyzes and discloses all potentially significant Project impacts before deciding to move forward with the Project.

The court laid these same arguments to rest in *Association of Irritated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708 ("*AIR*"). Just like the RTC and Progressive Rail, the respondent county in that CEQA suit argued that it was "preempted by the [ICCTA] from imposing mitigation measures to reduce potential impacts of train movements." *Id.* at 752. The court, however, explained that CEQA requires the lead agency "to mitigate or avoid significant environmental effects of [the] project if it is feasible to do so," and federal preemption is just one factor affecting feasibility. *Id.* (citing § 21002.1(b)) (emphasis added). Like all such factors, the ICCTA's preemptive effect on particular mitigation options must be considered by the agency "in the first instance" as part of its required review of the project under CEQA. *Id.* at 753. Whether a particular mitigation measure would so "unreasonably interfere[] with railroad transportation" as to be preempted by the ICCTA "requires a factual assessment" that can only be undertaken in the context of a comprehensive and fully compliant EIR. *Id.* Until the RTC undertakes this analysis, any consideration by this Court of the ICCTA's as-applied preemptive effect on particular mitigation measures or alternatives is premature. *Id.*

Further, Progressive Rail and the RTC are wrong that all mitigation measures would be preempted. Several measures could reduce the Project's impacts without "unreasonably interfer[ing] with the jurisdiction of the [STB]." *Friends of the Eel River*, 3 Cal.5th at 741 (Kruger, J., concurring). For instance, the RTC could bar Progressive Rail from "undertak[ing] temporary rail car storage" or locating other ancillary facilities in sensitive habitats or wetlands. AR 6:2967; *Boston & Maine Corp.*, 2001 STB LEXIS 435 at *14. It could also impose conditions on how the track repair work is done, to minimize air quality and sensitive habitats impacts. *See Friends of the Eel River*, 3 Cal.5th at 725 (STB does not

regulate "what the best method of repair might be"). And even Progressive Rail appears to concede that the RTC could potentially impose voluntary measures, such as a voluntary emission reduction agreement to mitigate air quality impacts from the increased freight traffic. PR:10. The RTC must evaluate such potentially feasible measures in an EIR.

V. The Court Can Consider the Scope of the Writ of Mandate Only After Ruling on the Merits of the Greenway's CEQA Claims.

Progressive Rail also contends that the ICCTA narrows the injunctive relief that the Court may enter. PR:9. To the extent that Progressive Rail believes the ICCTA preempts all possible CEQA remedies, it is clearly wrong. The Supreme Court flatly rejected this argument in *Friends of the Eel River*, explaining that the public agency railroad owner and private freight operator are "distinct for the purposes of preemption, at least in [the present] circumstance[] where the ICCTA leaves a regulatory hole…." 3 Cal.5th at 740. Regardless of whether the ICCTA may prevent it from directly enjoining Progressive Rail's operations, this Court may "apply[] CEQA and its remedies to [the RTC]," even if doing so may indirectly impact Progressive's operations. *See id.* (explaining that any interference with the private freight operator is "merely derivative of the state's efforts at self-governance").

In any event, any discussion about the appropriate scope of injunctive relief is premature. Evaluation of appropriate CEQA remedies is a post-merits issue, which courts undertake only after determining whether the lead agency has violated CEQA. § 21168.9(a); *see Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 240. If the Court determines that the RTC violated CEQA, the parties will present their views on the appropriate scope of relief in a manner consistent with the Rules of Court and as this Court directs.

CONCLUSION

The RTC handed over control of a valuable public amenity to a private rail operator, for at least a decade, without studying the environmental consequences of the planned freight expansion. This action violated CEQA. For the foregoing reasons, Greenway urges this Court to grant the petition for writ of mandate.

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